APPENDIX A – INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
STEVEN ROCKMAN
JEFFREY FOSTER
MARTIN KUPER

18 U.S.C. § 1341 (mail fraud – 5 counts)
18 U.S.C. § 1343 (wire fraud – 1 count)
18 U.S.C. § 2 (aiding and abetting)

INDICTMENT
COUNTS ONE THROUGH FIVE

THE GRAND JURY CHARGES THAT:

At all times material to this Indictment:

1. Defendant STEVEN ROCKMAN was Senior Vice President in charge of *e*Marketing, the interactive division within Tierney Communications ("TC"), which was headquartered at the Bellevue Building located at 200 South Broad Street, Phila-

delphia, PA 19102. ROCKMAN also was the president and sole shareholder of Nanosoft and Courtside Six LLC, companies that he used to receive and conceal proceeds of the scheme described below.

2. Defendant JEFFREY FOSTER was Vice President of Marketing at TC. FOSTER also was the president and sole shareholder of JMG Marketing, a company that he created to receive and conceal proceeds of the scheme described below.

3. Defendant MARTIN KUPER, the father-in-law of defendant STEVEN ROCKMAN, was the owner of DotCom. DotCom was a company created to further the scheme and receive and conceal proceeds of the scheme as described below.

THE SCHEME TO DEFRAUD TC

4. From at least in or around October 2000, to in or around March 2002, at Philadelphia, in the Eastern District of Pennsylvania, and elsewhere, defendants

STEVEN ROCKMAN,

JEFFREY FOSTER

And

MARTIN KUPER

devised and intended to devise a scheme to defraud TC and to obtain, by means of false and fraudulent pretenses, representations, and promises, money and property of TC.

It was part of the scheme that:

5. Defendants STEVEN ROCKMAN and JEFFREY FOSTER created invoices for services which were never rendered in order to receive money from TC to which they were not entitled. Defendants ROCKMAN and FOSTER directed DotCom to prepare invoices and submit them to TC for payment for services that were never rendered by defendants ROCKMAN and FOSTER.

6. Defendants STEVEN ROCKMAN and JEFFREY FOSTER caused the invoices to be sent by facisimile and payment of the invoices to be sent through the United States mail from TC to DotCom for payment. Once TC sent payment on the invoices to DotCom, defendant MARTIN KUPER through DotCom, caused payments of the stolen money to be distributed to defendants ROCKMAN and FOSTER. For example:

a. On or about March 28, 2001, defendant STEVEN ROCKMAN instructed JK, an individual known to the grand jury and an employee of DotCom, to prepare invoices for defendants ROCKMAN and JEFFREY FOSTER. Defendant ROCKMAN instructed JK to create an invoice for defendant ROCKMAN in the amount of $51,000 and an invoice for defendant FOSTER in the amount of $51,000 and directed that JK increase the above invoices by a total $38,000 which represented to portion of the stolen funds retained by DotCom. Defendant ROCKMAN further told JK that the invoices should read "standard" but that JK should add "database development" as the description of services rendered when, in fact, the services described were never rendered by either defendant ROCKMAN or defendant FOSTER. DotCom sent the above invoices to TC by facsimile after which TC mailed payment on the invoices to DotCom. DotCom then distributed the money to defendants ROCKMAN and FOSTER. The above invoices prepared by DotCom did not contain the names of either defendant ROCKMAN or FOSTER anywhere on the invoices.

b. On or about August 13, 2001, defendant STEVEN ROCKMAN instructed JK to create an invoice for defendant ROCKMAN in the amount of $15,000 and an invoice for defendant JEFFREY FOSTER in the amount of $15,000 and directed that JK increase the above invoices by a total of $6,000, which represented the portion of the stolen funds re-

tained by DotCom. Defendant ROCKMAN further told JK that the invoices should include the "standard" description for services rendered when, in fact, the services described were never rendered by either defendant ROCKMAN or defendant FOSTER. DotCom sent the above invoices to TC by facsimile after which TC mailed payment on the invoices to DotCom. DotCom then distributed the money to defendants ROCKMAN and FOSTER. The above invoices prepared by DotCom did not contain the names of either defendant ROCKMAN or defendant FOSTER anywhere on the invoices.

7. As the vice president in charge of the interactive unit under which the fraudulent invoices were submitted, defendant STEVEN ROCKMAN approved the fraudulent DotCom invoices to ensure that TC sent payment for the fraudulent invoices to DotCom.

8. Early in the scheme, DotCom paid defendants STEVEN ROCKMAN and JEFFREY FOSTER their respective portions of the fraudulently invoices amounts by writing checks made out to defendants ROCKMAN and FOSTER.

9. later in the scheme, in an attempt to prevent the discovery of the nature and source of the fraudulent payments to defendants STEVEN ROCKMAN and JEFFREY FOSTER, defendants ROCKMAN and FOSTER directed DotCom to make the checks payable to "Nanosoft" and "JMG Consult

ing," respectively, which were the shell companies created by defendants ROCKMAN and FOSTER for purposes of receiving and concealing the stolen money.

10. On or about March 22, 2002, upon being informed by TC that an audit would be conducted on DotCom's books, defendant MARTIN KUPER immediately contacted defendant STEVEN ROCKMAN and informed him of the upcoming audit. In an attempt to conceal the scheme, defendant KUPER prepared a list of invoices that defendants ROCKMAN and JEFFREY FOSTER had to create in order to justify fraudulent invoices which had been sent by DotCom to TC for payment as part of the scheme.

11. Defendant STEVEN ROCKMAN gave defendant JEFFREY FOSTER the list of invoices prepared by defendant MARTIN KUPER and told defendant FOSTER to prepare fraudulent invoices to justify the billing and further conceal the scheme. The fraudulent invoices were created and sent to DotCom prior to the audit.

12. During the audit by TC on DotCom's books on March 25, 2002, defendant MARTIN KUPER provided TC with the fraudulent invoices prepared by defendants STEVEN ROCKMAN and JEFFREY FOSTER to justify the fraudulent billing. Defendant KUPER also failed to inform TC about his personal relationship with defendant ROCKMAN.

13. Defendants STEVEN ROCKMAN and JEFFREY FOSTER caused TC to pay approximately $743,022 on fraudulent invoices.

THE MAILINGS

14. On or about the dates et forth below, in the Eastern District of Pennsylvania and elsewhere, having devised and intending to devise the scheme, defendants

STEVEN ROCKMAN

JEFFREY FOSTER

And

MARTIN KUPER,

For the purpose of executing the scheme and attempting to do so, knowingly caused to be delivered by the Postal Service, according to directions thereon, from TC to DotCom located at 2655 Philmont Avenue, Suite 200, Huntingdon Valley, PA 19006, the following mail matter relating to the submission of the fraudulent invoices from DotCom to TC for payment for services that were never rendered:

COUNT	DATE	DESCRIPTION OF MAILING

ONE	November 17, 2000	Check in the amount of $4,500.00 mailed from TC to DotCom for payment on invoice #FJ702.
TWO	November 17, 2000	Check in the amount of $4,500.00 mailed from TC to DotCom for payment on invoice #375.
THREE	May 4, 2001	Check in the amount of $11,400.00 mailed from TC to DotCom for payment on invoice #JF712
FOUR	September 28, 2001	Check in the amount of $16,500.00 mailed from TC to DotCom for payment on invoice #R392
FIVE	November 16, 2001	Check in the amount of $37,237.50 mailed from TC to DotCom for payment on invoice #JF711B.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 13 of Counts One through Four are realleged here.

2. From at least in or around November 2001, to in or around March 2002, at Philadelphia in Eastern District of Pennsylvania, and elsewhere, defendants.

STEVEN ROCKMAN

and

JEFFREY FOSTER

devised and intended to devise a scheme to defraud TC and to obtain, by means of false and fraudlent pretenses, representations, and promises, money of TC.

It was part of the scheme that:

3. Defendants STEVEN ROCKMAN and JEFFREY FOSTER attempted to continue the fraudulent scheme described above by hiring a separate entity to submit the fraudulent invoices to TC for payment to defendants ROCKMAN and FOSTER.

4. In November 2001, defendant JEFFREY FOSTER contacted M.T., an individual known to the grand jury, who lived and worked in Massachusetts. Defendant JEFFREY FOSTER hired M.T. to do billing work for T.C.

5. Defendants STEVEN ROCKMAN and JEFFREY FOSTER provided M.T. with invoices for work allegedly done for TC by Nanosoft and JMG Consulting, respectively. Each invoice billed $7,500.00 worth of work that both defendants ROCKMAN and FOSTER know had not been performed and for which they were not entitled to any money.

6. Without knowledge of the fraudulent nature of the invoices submitted to him by defendants STEVEN ROCKMAN and JEFFREY FOSTER, M.T. then prepared an invoice totaling $16,700.00 which included the Nanosoft and JMG Consulting invoices plus M.T.'s fee. On or about December 14, 2001, M.T. faxed the invoices to TC from Massachusetts to Philadelphia, PA.

7. On or about February 1, 2002, TC sent a check for $16,700.00 To M.T. in Massachusetts, M.T. then forwarded $15,000,00 to defendant JEFFREY FOSTER.

8. On or about March 11, 2002, in the Eastern District of Pennsylvania and elsewhere, defendants

STEVEN ROCKMAN

and

JEFFREY FOSTER,

for the purpose of executing the scheme described above, caused to be transmitted by means of wire communication in interstate commerce, from Massachusetts to Pennsylvania, certain signs, signals and sounds, that is, an invoice for payment in the amount of $7,150.00.

In violation of Title 18, United States Code, Sections 1343 and 2.

A TRUE BILL:

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FOREPERSON

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PATRICK L. MEEHAN
United States Attorney

APPENDIX B – MOTION TO DISMISS THE INDICTMENT, DATED MARCH 6, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA:
v. :
MARTIN KUPER :Cr. No.05-CR-167-03

ORDER

AND NOW, this day of , 2007, upon consideration of the within Motion, it is hereby ORDERED that defendant's Motion to Dimiss the Indictment is GRANTED, pursuant to the provisions of the Speedy Trial Act (18 U.S.C. § 3161(h)(8)).

BY THE COURT:

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J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
MARTIN KUPER Cr No. 05-CR-167-03

MOTION TO DIMISS THE INDICTMENT
(SPEEDY TRIAL ACT)

AND NOW COMES JEFFREY M. MILLER, ESQUIRE of Nasuti and Miller, Attorneys at Law, on behalf of defendant, MARTIN S. KUPER respectfully moving this Honorable Court to dismiss the Indictment herein for the following assigned reasons:

1. On March 23, 2005, an Indictment was returned as to Steven Rockman, Jeffrey Foster and moving defendant Martin Kuper. On or about March 30, 2005, moving defendant Martin Kuper was arraigned before United States Magistrate Judge Jacob P. Hart and was released on bail. Moving counsel entered said Appearance on or about the

same date and $25,000 OR bond was entered as to Martin Kuper.

2. On or about April 6, 2005, moving defendant Kuper filed various pretrial Motions for Discovery, Inspection and Brady information and an Order for Speedy Trial delay was entered setting up excludable time in the above captioned case pending the disposition of the Motions. As the docket entries clearly reflect said Motions were timely resolved.[1]

3. As a result of an uncontested Motion by counsel Marc Neff, Esquire representing a co-defendant, on April 18, 2005 this Honorable Court entered an Order to continue the case because of a trial conflict. Although an Order issued postponing the trial in the interest of justice, the government did not submit any 1findings or reasons to support the postponement nor did the Order granting the continuance set forth findings or reasons justifying an additional period of delay and/or did not schedule a new, fixed trial date as required by 18 U.S.C. § 3161(h)(8)(A) – See Zedner v. United States, 547 U.S. ____, 126 S.Ct. 1976, 164 L.Ed. 2d. 749 (2006).

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[1] A true and correct copy of the docket entries are attached hereto and incorporated by reference and marked as defendant's Exhibit 1.

4. After the time requested by this continuance expired, no trial was scheduled until March of 2007, a period of approximately nineteen months.

5. It is respectfully submitted that the failure of the government to submit any proposed findings and/or reasons for the two year delay coupled with the absence of any findings and/or reasons to support the Order granting the 2005 postponement violated the moving defendant's rights under the Speedy Trial Act and requires dismissal, with prejudice, of the Indictment as to moving defendant Kuper.

Respectfully submitted,

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JEFFREY M. MILLER, ESQUIRE
Attorney for defendant
MARTIN S. KUPER

Dated: March 6, 2007

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

US OF AMERICA	:
v.	:
MARTIN KUPER	:Criminal No. 05-CR-167-03

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT (SPEEDY TRIAL ACT)

In Zedner v. United States, 547 U.S. ___, 126 S.Ct. 1976, 164 L.Ed. 2d. 749 (2006), the Supreme Court recently clarified the Federal Speedy Trial Act, 18 U.S.C. § 3161(c)(1) which requires that a defendant in a criminal case is to be given a trial within seventy (70) days of being charged or making his first Appearance. The Supreme Court of the United States in Zedner clarified the requirement that any "ends of justice" continuance must embrace and expressly set forth findings on the record and in the Order reasons to support a § 3161(h)(8) continu-

ance. Justice Alito speaking for The Court held that a District Court's failure to make the required findings of delay, on the record, required the Indictment in Zedner to be dismissed.

While much of the Speedy Trial Act's flexibility is furnished by § 3161(h)(8), which governs ends of justice postponements, Justice Alito made it abundantly clear that the Act requires that when a District Court grants and ends of justice continauance, it must set forth its reasons for finding that the ends of justice are served and that this continuance can only be granted on the basis of the Distrct Court's explicit unambiguous and precise findings setting forth the reasons for the conclusion that the ends of justice are better served by granting a postponemtn. The Supreme Court concluded, in part, that without such an on the record finding, there can be no § 3161(h)(8).

Earlier lower ourt Opinions also reflected the clear mandate of the Speedy Trial Act in requiring express reasons and findings to support an Order granting a delay. The delay here, some two years, was such that itt clearly violated the requirement not only that reasons/findings be set forth on the record or in an Order but there was no rescheduled, reasonable trial dateset from the 2005 ends of justice delay occasioned entirely by the requested of a co-defendant. United States v. Adeniji, 988 F.2d 972 (CA9, 1993), cert. denied, 114 S.Ct. 329, 510 U.S. 925, 126 L.Ed. 2d. 275; United States v. Jordan, 915 F.2d 563 (CA9,

1990); United States v. Perez-Reveles, 715 F.2d 1348 (CA9, 1983).

In this case, the Speedy Trial Act protections afforded by the Statute required the moving defendant to receive a trial within 70 days of his initial appearance before the Court. While the Court granted an uncontested Motion by an attorney for a co-defenant for continuance, in April of 2005, predicated on that lawyer's conflict in trial schedule, the resulting absence of findings or reasons expressly supoportig the conclusions that the ends of justice required a postponement and, in addition, the extraordinary two year delay coupled with an absence, in 2005, setting forth a new trial date warrans a dismissal of the Indictment as to defendant Kuper, herein.

Respectfully submitted,

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JEFFREY M. MILLER, ESQUIRE
Attorney for Defendant
MARTIN S. KUPER

Dated: March 6, 2007

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served this 6th day of March, 2007 by the United States First Class Mail, postage prepaid, upon the following:

Vineet Gauri, AUSA
United States Attorney's Office
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106

JEFFREY M. MILLER

APPENDIX C – BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT ON SPEEDY TRIAL GROUNDS, DATED MARCH 13, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	Criminal No. 05-167-3
MARTIN KUPER	:	

UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT ON SPEEDY TRIAL GROUNDS

The United States of America, by and through its counsel, Patrick L. Meehan, United States Attorney for the Eastern District of Pennsylvania, and Vincet Gauri, Assistant United States Attorney, hereby files its answer and memorandum of law in opposition to Defendant Martin Kuper's motion to pursuant to the Speedy Trial Act to dismiss the indictment. In support of its answer, the United States sets for the following in opposition to Defendant's motion

I. PROCEDURAL HISTORY

On March 23, 2005, the indictment against Defendant Martin Kuper and his co-defendants Steven Rockman and Jeffrey Foster was filed. (*See* Docket Number 1.) On March 29, 2005, Magistrate Judge Jacob P. Hart arraigned Defendant Kuper, who entered a plea of not guilty as to counts 1-5 of the indictment. (D.N.11.) Magistrate Judge Hart released Defendant Kuper on a $25,000 bond. (D.N.12).

On April 5, 2005, Defendant Foster filed a motion for discovery. (D.N. 21). On April 6, 2005, Defendant Kuper filed his motions for discovery and Brady material. (D.N.22, 23). That same day, the Court entered orders excluding time under the Speedy Trial Act from the dated of the motions filed by Defendants Foster and Kuper until the disposition of such motions. (D.N. 24, 2\5). On April 7, 2005, the Court set a trial dated of May 167, 2005 as to all three defendants. (D.N. 26-28).

On April 13, 2005, Defendant Rockman filed a motion to continue the trial based on a conflict in his attorney's trial schedule. (D.N. 29). Defendant Rockman noted that this attorney has a multi-defendant jury trial set to begin on April 18, 2005. That trial was expected to last four to six weeks. Citing 18 U.S.C. §§3161(h)(8)(A) and 3161(h)(8)B)(iv), Defendant Rockman stated that a failure to grant a continuance would deny him the reasonable time necessary for effective preparation,

taking into account the exercise of due diligence, and that a continuance both served the ends of justice and outweighed the best interests of the public and the defendant in a speedy trial. *Id.* Defendant Rockman included a proposed order to that effect with his motion, which added supporting language stating that "scheduling an earlier trial dated would deny the Defendant continuity of counsel." *Id.* The same day, Defendant Rockman also filed a motion for discovery. (D.N. 30).

On April 14, 2005, the Court entered an order excluding time under the Speedy Trial Act from the date of the two motions filed by Defendant Rockman until the disposition of the motions. (D.N.31). On April 18, 2005, the Court entered its own order granting Defendant Rockman's motion to continue. (D.N.32). That order read as follows:

> [U]pon consideration of Defendant Steven Rockman's motion for continuance and Co-Defendants and counsel for the Government joining in said motion, it is hereby ORDERED and DECREED that the Motion for Continuance is hereby GRANTED. The Court finds that granting the motion to continue serves the ends of justice and outweighs the best interest of both the public and the Defendant in a speedy trial. See 18 U.S.C. § 3161(h)(8)(A).

Id. On April 25, 2005, the Court entered orders granting all three defendants' discovery motions. (D.N.35-38). The parties failed to request a new trial dated and did not bring anything else to the attention of the Court for the remainder of 2005.

On January 9-10, 2006, the Court scheduled change of plea hearings for Defendants Rockman and Foster for February 13, 2006. (D.N. 40,41). Those hearings were cancelled and then rescheduled. (D.N. 42-45). On June 8, 2006, the United States filed a memorandum supporting a change of plea by Defendant Foster. (D.N. 47). On June 12, 2006, the Court accepted a guilty plea by Defendant Foster. (D.N. 48).

On December 20, 2006, the Court scheduled a change of plea hearing for Defendant Rockman on February 6, 2007, the Court accepted a guilty plea by Defendant Rockman. (D.N.57). On February 9, 2007, the Court set a trial dated of March 26, 2007 for Defendant Kuper and issued a scheduling order for pretrial filings. (D.N. 59-60). On March 6, 2007, Defendant Kuper filed his motion to dismiss the indictment based on a violation of the Speedy Trial Act. (D.N.62).

II. DEFENDANT'S ARGUMENTS RELATING TO HIS CO-DEFENDANTS AND *ZEDNER* ARE MISPLACED

In his motion, Defendant argues that, after the Court's April 18, 2005 Order, "no trial was scheduled

until March of 2007, a period of approximately nineteen months. It is respectfully submitted that the failure of the government to submit any proposed findings and/or reasons to support the Order granting the 2005 postponement violated the moving defendant's rights under the Speedy Trial Act[2] and requires dismissal, with prejudice, of the Indictment..." Defendant's Motion at 2.

In support of his argument, Defendant notes that the April 18, 2005 Order granting a continuance under the ends of justice "was occasioned entirely by the request of a co-defendant." Defendant's Mem. At 2. It is well-settled that any defendant's motion resulting in excludable time tolls the speedy trial clock for his co-defendants as well. *See United States v. Casas,* 425 F.3d 23, 31 (1st Cir. 2005); *United States v. Kraselinick,* 702 F. Supp. 489, 492 n.3 (D.N.J. 1988). Regardless, the Order notes that the co-

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[2] Defendant only argues that his rights under the Speedy Trial Act have been violated; he does not assert any separate infringement of his Sixth Amendment right to a speedy trial. *See Government of Virgin Islands v. Duberry,* 923 F.2d 317, 323 (3rd Cir. 1991) (claimed violations of Speedy Trial Act are distinct from claimed violations of the Sixth Amendment's right to a speedy trial). Defendant has the burden of proof to support his motion dismiss the indictment under the Speedy Trial Act. 18 U.S.C. § 3162(a)(2).

defendants joined in Defendant Rockman's motion.[3] (D.N.32).

Defendant also relies on the Supreme Court's decision in *Zedner v. United States,* 547 U.S. ____, 126 S.Ct. 1976 (2006). Defendant's Mem. at 1. Defendant states that "*Zedner* clarified the requirement that any 'ends of justice' continuance must embrace and expressly set forth findings on the record and in the Order reasons [sic] to support a § 3161(h)(8) continuance." Defendant's Mem. at 1.

This case is easily distinguishable from *Zedner*, where the District Court had the defendant sign a pre-printed form stating the following: "I waive all of such rights to a speedy trial and to make such a motion or motions for all time." *Id.* at 1982. The Supreme Court held that "a defendant may not prospectively waive the application of the Speedy Trial Act. It follows that [defendant's] waiver 'for all time' was ineffective." *Id.* at 1987. Such a result-where the defendant is effectively opting out of the Act entirely – would not comport with the public interest the Act was designed to serve. *Id.* at 1985-87. Further, in dicta, the Supreme Court stated that "if a judge fails to make the requisite findings regarding

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[3] It should be noted that the Court's consideration of the plea agreements for Defendants Foster and Rockman did toll the speedy trial clock for at least several days in June 2006 and February 2007. *See* 18 U.S.C. § 3161(h)(1)(I).

the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be dismissed." *Id.* at 1989.

Here, the April 18, 2005 Order was not a prospective waiver. While the Order did not make explicit findings in support of the ends of justice continuance under Section 3161(h)(8)(A), it clearly referenced Defendant Rockman's motion. That motion was premised on his attorney's scheduling conflict with another trial and the Act's provision for providing the reasonable time necessary for counsel's effective preparation, taking into account the exercise of due diligence under Section 3161(h)(8)(B). (D.N.32). Defendant Rockman also attached a proposed order to that effect, including additional supporting language stating that "scheduling an earlier trial dated would deny the Defendant continuity of counsel." *Id.*A court need not make explicit findings under Speedy Trial Act to justify a continuance where the reasons are plainly set forth in a party's motion papers. *See United States v. Balsam,* 203 F.3d 72, 80 (1st Cir. 2000); *United States v. Lattany,* 982 F.2d 866, 879 (3rd Cir. 1993).

Moreover, open-ended continuances, while not encourage, are sometimes inevitable where the court must order a continuance in the interest of justice without knowing exactly how long the reasons supporting the continuance will remain valid. *See Lattany,* 982 F.2d at 881. Such open-ended continuances cannot be unreasonably long. *Id.* at 882. The Third Circuit has not articulated a time limit on the reasonableness of an open-minded continuance, but it has deemed open-ended continuance exceeding 12 and 19 months to be reasonable. *United States v. Groff,* No. 05-1634, 2006 WL 952226 (3rd Cir. April 13, 2006) (not precedential) (19 months); *Lattany,* 982 F.2d at 882-83 (12 months.)

In *Groff,* the continuance was based on a joint request by the parties for the sake of conducting voluminous and complicated documentary discovery required by the case. 2006 WL 952226, at *1. The District Court did not set a new trial date when it granted the continuance, apparently relying on the parties to request one after discovery was completed. *Id.* Even though the parties were complicit in the lengthy delay, the Third Circuit has some doubts about whether it was reasonable in light of the public's interest in a speedy trial. *Id at* * 3. Nevertheless, while discouraging the use of open-minded continuances where possible, the Third Circuit did not find that the District court abused its discretion in granting such a continuance based on unusual discovery-related issues. *Id.* The parties in this case

did join in Defendant Rockman's motion, although the motion itself was mainly limited to a trial conflict for Defendant Rockman's counsel in the near future.

In *Lattany,* a number of unusual circumstance led to the lengthy open-ended continuance, including legal issues relating to a possible insanity defense, a number of defense attorneys withdrawing from representation, and the defendant ultimately deciding to represent himself. 982 F.2d at 874-76. Admittedly, those types of extenuating circumstances are not present in this case. The Third Circuit did note, however, that defendants "cannot be wholly free to abuse the system by requesting (h)(8) continuances and then argue that there convictions should be vacated because the continuance they acquiesced in were granted."[4] *Id.* at 883.

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[4] Even so, there is no question that the Government "has a statutory obligation to ensure that the purposes of the Speedy Trial Act are carried out..." *Lattany,* 982 F.2d at 882; *see also U.S. v Saltzman,* 984 F.2d 1087, 1091 (10th Cir. 1993) ("Because the filing of the indictment lies entirely within the prosecutor's discretion, it is ultimately the obligation of the Government to ensure compliance with the Speedy Trial Act.").

III. THE COURT CAN SUPPLEMENT THE FINDINGS IN ITS APRIL 18, 2005 ORDER WITH SUPPORTING FACTS THAT EXISTED AT THE TIME

A District Court cannot retroactively find the facts necessary to grant a continuance after the defendant has made a motion to dismiss under the Speedy Trial Act. *Groff,* 2006 WL 952226, at *3; *United States v. Carrasquillo,* 667 F.2d 382 (3rd Cir. 1981). However, the District court can grant a continuance based on the "ends of justice" of Section 3161(h)(8)(A) before the Speedy Trial Act's 70 days have run, and then, at a later date, articulate the full reasons that it feels support the continuance. *See Lattany,* 982 F.2d at 878; *United States v. Brenna,* 878 F.2d 117, 122 (3rd Cir. 1989).

Indeed, the Supreme Court restated this principle in its Zedner opinion. After noting that the Speedy Trial Act was ambigious on precisely when the findings supporting the continuance must be set forth, the Court stated that "at the very lease the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under § 3162(a)(2)." 126 S.Ct. at 1989.

Thus, in this case, the Court could supplement the findings in its April 18, 2005 Order to support the lengthy continuance that resulted. Of course, a *nunc pro tunc* determination is impermissible; any sup-

plemental findings must have formed the grounds for the continuance in the first place. *See Brenna*, 878 F.2d at 122. Aside from the Defendants' motions for discovery – which were granted a week after the Court issued its April 18, 2005 continuance – the only basis apparent in the record was continuity of counsel, based on the scheduling conflict of counsel for Defendant Rockman, and the associates time needed for effective preparation, taking into account due diligence. These ground were presented in Defendant Rockman's motion and proposed order for continuance. (D.N. 29).

IV. ANY DISMISSAL OF THIS CASE SHOULD BE WITHOUT PREJUDICE

If the Court determines that a dismissal of the indictment as to Defendant Kuper is required under the Speedy Trial Act, it has the option of dismissing the indictment with or without prejudice.[5] *See* 18 U.S.C. § 3162(a)(2). In determining whether to dismiss this case with or without prejudice, the court must consider at least the following factors: (1) the

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[5] A dismissal without prejudice would permit the Government to seek a new indictment against Defendant Kuper within six (6) calendar months of the expiration of the statute of limitations or, if the statute of limitation has already expired, within six (6) calendar months of the date of dismissal of the indictment. *See* 18 U.S.C. §§ 3288, 3289.

seriousness of the offence; (2) the facts and circumstances of the case which led to the dismissal; and (3) the impact of a reprosecution on the administration of the Speedy Trial Act and on the administration of justice. *Id.* The Supreme Court has concluded that there is no presumption in favor of either form of dismissal. *United States v. Taylor,* 487 U.S. 326, 334 n. 15 (1988).

A. Seriousness of the Offense

The indictment charges defendants with five counts of mail fraud, which carries a maximum prison sentence of 20 years. *See* 18 U.S.C. § 1341. A statutory maximum sentence of 20 years is "persuasive evidence" that Congress considers the offence to be a serious crime. *See United States v. Carvajal-Garcia,* 54 Fed. Appx. 732, No. 01-4532, 2002 WL 31667659 (3rd Cir. Nov. 27, 2002), at *2 (finding illegal reentry to be a serious crime in Section 3162(a)(2) analysis due to its statutory maximum sentence of 20 years); *see also United States v. Mancia-Perez,* 331 F.3d 464, 468 (5th Cir. 2003) (offense was serious under Section 2162(a)(2) where defendant faced possible 20 year sentence).

Moreover, the indictment charges defendants with having caused a loss amount exceeding $740,000 in their mail fraud scheme. *See United States v. Scott,* 270 F.3d 30, 58 (1st Cir. 2001) (bank fraud was serious offense in Section 3162(a)(2) analysis where maximum sentence was 30 years and loss amount

was only $35, 500). Because Defendant Kuper is charged with an offence that must be categorized as serious, the first factor favors a dismissal without prejudice.

B. Facts and Circumstances of the Case

There is no doubt that there has been a lengthy delay since the Court issued its April 18, 2005 Order. However, the Government has engaged in good faith plea agreements with Defendants Foster and Rockman. While time spend in plea negotiations is not excludable under the Speedy Trial Act, "it is a relevant factor to consider with regard to what caused the delay." *See United States v. Archer,* 984 F.Supp. 321, 324 (E.D. Pa. 1997) (Katz, J.)

Notably, Defendant does not allege any prosecutorial bad faith or attempt to gain tactical advantage. *See Carvajal-Garcia,* 2002 WL 31667659, at *3 ("Congress granted courts the discretion to dismiss to circumvent the dictates of the Speedy Trial Act."); *United States v. Strickland,* No. A-04-58, 2004 WL 1468992 (E.D. Pa. April 7, 2004) (DuBois, J.), at *2 ("In the absence of affirmative misconduct, it is within the Court's discretion to dismiss an indictment without prejudice."); *United States v. Rivera,* No. 01-565, 2002 WL 1021820 (E.D. Pa. May 7, 2002) (Schiller, Jr.), at *3 (defendant did not show that Government caused delay "delibertyly to harass him or gain an improper tactical advantage"). The fact that the continuance at issue here was the request of

a co-defendant, and joined by Defendant Kuper, should also be weighed. *See United States v. Low*, 452 F.Supp.2d 1036, 1046 (D. Hawaii 2006). Thus, the second factor also favors a dismissal without prejudice.

C. Impact of Reprosecution on the Administration of the Act and Justice

A dismissal with prejudice undoubtedly would have a stronger deterrent effect than a dismissal without prejudice. Nonetheless, dismissal without prejudice "is not a toothless sanction," as it imposes costs on the Court and the Government, which encourage compliance. *See Taylor*, 487 U.S. at 342; *see also Zedner*, 126 S.Ct. at 1984-85. Indeed, the Defendant may also derive some benefit from a dismissal without prejudice, since "the time and energy that the prosecution must expend in connection with obtaining a new indictment may be time and energy that the prosecution cannot devote to the preparation of its case." *Zedner*, 126 S.Ct. at 1987; *see also Low*, 452 F.Supp.2d at 1048 (dismissal without prejudice imposes appropriate costs on the Government). Reprosecution in this case "would have no adverse effect on the administration of the Speedy Trial Act Because there has been no deliberate violation of the Act." *See Strickland*, 2004 WL 1468992, at *2; *see also United States v. Blevins*, 142

F.3d 223, 226 (5th cir. 1998) (dismissal with prejudice for deterrent value inappropriate where Government did not intentionally delay proceedings).

Moreover, Defendant has not made any claim of prejudice or harm from the delay. He has not been incarcerated at any point in this case. Furthermore, Defendant has not asserted that the delay has adversely affected his ability to prepare for a trial. "He has not alleged that any evidence has been lost, witnesses have become unavailable, or memories have faded as a result of the delay." *Rivera,* 2002 WL 1021820, at *4; *see also Archer,* 984 F.Supp. at 324 (delay caused no prejudice to Defendant in his ability to prepare his defense). Therefore, like the other factors, the third factor weighs in favor of a dismissal without prejudice.

Accordingly, if the Court determines that the Speedy Trial Act has been violated in this case, the indictment against Defendant Kuper should be dismissed without prejudice.

V. CONCLUSION

The Court's April 18, 2005 Order did not grant a prospective waiver like the one struck down by the Supreme Court in *Zedner.* The Order granted an open-ended continuance, which has been permitted in the Third Circuit. Moreover, the Order was plainly based on Defendant Rockman's motion for continuance, which provided grounds for an exclusion of time under the Speedy Trial Act for both con

tinuity of counsel and effective preparation of counsel. However, should the Court determine that the Order granted an unreasonably long continuance that violated the Act, the Court should dismiss the indictment against Defendant Kuper without prejudice.

Respectfully submitted,

PATTRICK L. MEEHAN
United States Attorney

/s/

DATED: March 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Government's Brief in Opposition to Defendant's Motion to Dismiss Indictment on Speedy Trial Grounds has been served by me this date, by first-class mail and facsimile, upon the following:

Jeffrey M. Miller, Esq.
Nasuti and Miller
Public Ledger Building, Suite 1064
610 Chestnut Street
Philadelphia, PA 19106

/s/
VINEET GAURI
Assistant United States Attorney

DATED: March 13, 2007

APPENDIX D – OPPOSITION TO DISMISSAL ON SPEEDY TRIAL GROUNDS, DATED MARCH 15, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA

v.

MARTIN KUPER
Criminal No. 05-CR-167-03

ORDER

AND NOW, this day of , 2007, upon consideration of the within Response, it is hereby ORDERED that defendant's Motion to Dismiss the Indictment is GRANTED, pursuant to the provisions of the Speedy Trial Act (18 U.S.C. § 3161(h)(8)), with prejudice.

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

MARTIN KUPER
Criminal No. 05-CR-167-03

DEFENDANT MARTIN KUPER'S RESPONSE TO UNITED STATES'

OPPOSITION TO DISMISSAL ON SPEEDY TRIAL GROUNDS

AND NOW COMES JEFFREY M. MILLER, ESQUIRE of Nasuti and Miller, Attorneys at Law, 150 S. Independence Mall West, The Public Ledger Building, Suite 1064, Philadelphia, Pennsylvania 19106 on behalf of defendant, MARTIN S. KUPER respectfully filing this Response to the Government's Answer to the earlier Motion to Dismiss for Speedy Trial reasons.

The Answer by the government attempts, unsuccessfully, to avoid the clear, unambiguous Supreme Court language in Zedner v. United States, 547 US ___, 126 S.Ct. 1976 (2006). What the government

seems to fail to recognize is that while the Supreme Court spoke to several issues, including a prospective waiver as well as estoppel, those two legal prcples are not relevant, herein. What is before us in this case and squarely ruled on by the Supreme Court controlling decision, announced by Justice Alito is that when the Court grants a continuance, pursuant to § 3161(h)(8), the Order must be accompanied by a clear, precise and articulated reasons and/or findings that justify the continuance granted. There is no uncertainty in Zedner that if such an order issues, as has occurred in this case, without the requisite reasons/findings, there is no valid continuance or tolling of the Speedy Trial Act under § 3161(h)(8) provisions.

While the government argues in the alternative that the Indictment should not be dismissed, they set forth optional "back-up" contentions regarding a dismissal without prejudice as opposed to the requested, dismissal with prejudice. It is evident, most respectfully, that the government is fully ware as to the consequences and meaning of the ever so clear Zedner decision. It is also quite evident that this case does not deal with an open ended, in futuro waiver, an "estoppel" or the cobweb of facts which were the keystone of the ruling in United States v. Lattany, 982 F.2d 866, 879 (3d Cir. 1993).[6]

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[6] It is also to be noted that none of the cases relied upon by the government in their Answer was decided after Zedner and there-

The government further presses other uncontested issues in that they assert that the 2005 Order granting a continuance results in excludable time and tolls the Speedy Trial clock for all defendants. This is not critical to the issues presented to this Honorable Court nor disputed. As mentioned earlier in trying to distinguish Zedner from our case, the government goes on at length (on pages four and five of their Answer) discussing the preprinted, open ended future waiver which was the gist of one of the issues decided in Zedner. Again, while interesting, it is not germane to this argument nor does it raise any support for the government's contention that this Speedy Trial Act here was not violated.

In addition, the government cites inapposite cases endeavoring to support the ad infinitum, open ended continuance in this case. Cases relied on by the government were matters dealing with significantly complex, multi-issues regarding evidentiary problems, competency of the defendant, ever changing representation by various lawyers and voluminous pretrial discovery. None of those facts is presented in this case and certainly those decisions do not sup

---

fore have limited applicability. While the government has generally relied on the Lattany decision which is factually inapposite. Lattany does clearly require that the government has the statutory obligation to ensure that the purposes and deadlines of the Speedy Trial Act are followed.

port, by their holdings and/or the facts, what happened, herein. More appropriate to our analysis might be United States v. Brooks, 697 F.2d 517 (3d Cir. 1982), cert denied 103 S.Ct. 1526, 460 U.S. 1071, 75 L.Ed.2d. 949 cert denied 103 S.Ct. 1531, 460 U.S. 1073, 75 L.Ed.2d. 952; United States v. Tunnessen, 763 F.2d 74 (2d Cir. 1985).

Finally, the defense does seek a dismissal with prejudice. Simply dismissing this case without prejudice would give the government a "'pyrrhic loss" in that they could quickly, without much fuss and ado, retype the Indictment by changing a date or so and present it to the next Grant Jury. If this be done, defendant, who would have suffered a substantial Seedy Trial Act violation, would then be placed in virtually the same pretrial posture. It is respectfully submitted that this would not take into account the clear statutory intend of the speedy Trial Act nor the theme of the recent opinion in Zedner.

In anticipating a possible dismissal, the government here has gone to ample lengths in their Answer to address the question of prejudice verses non-prejudicial dismissal. They assert that the seriousness of the offense is a concern. The defense agrees but suggests this prosecution does not involve organized crime, narcotics, weapons, threats and/or injury to property or person. Indeed, it is, at most, an excess billing scheme clearly devised by two ex-employees of the victim company who have both entered pleas of guilty and await sentencing. It is the

understanding of counsel that the victim company, as a result of civil litigation, has settled the earlier law suite with the three defendants. While the defense does not suggest that this matter is de minimus, it also does not rank as one of the most serious offense in the recent history of our judicial system.

Regarding the facts and circumstances relating to the potential dismissal, herein, moving defendant is entirely without fault. While the government did not ensure that the Speedy Trial Act was satisfied, as required, defendant does not cast criticism towards the government but, on the other hand, does not accept any responsibility, whatsoever, for the inordinate and unambiguous violation of his Speedy Trial Act rights.

With respect to the other factor pertinent to the dismissal with or without prejudice, a reprosecution with a newly printed Indictment rapidly sailing through the Grand Jury would serve to "fly in the face" of the very spirit of the Speedy Trial Act protection. It is respectfully submitted that the administration of justice would not be harmed or forever prejudiced by this particular defendant who is 62, a long time physics professor with no prior criminal record who was, as I am sure the government would openly admit, the least culpable in this scheme. For these reasons, we submit that the Indictment should be dismissed with prejudice.

Most of the cases dealing with dismissal without prejudice center around major drug conspiracies and/or organized crime. A number of decisions permitting dismissal with prejudice are much closer, legally and factually, to the matter at hand. United States v. Smith, 588 F.Supp. 1403 (DC Hawaii 1984); United States v. Jones, 602 F.Supp. 1045 (Ed.PA 1985), dismissed the Indictment with prejudice where the Court found that the inordinate delay was not the defendant's fault, the Federal Incitement against the moving defendant was over two years old and dismissal without prejudice would contravene the Speedy Trial Act condoning delay caused by the case being "lost in the shuffle".[7]

Respectfully submitted,

JEFFREY M. MILLER, ESQUIRE
Attorney for defendant,
MARTIN S. KUPER

Dated: March 15, 2007

[7] The government apparently suggests that the Court can now place on the record reasons justifying the earlier continuance some two years ago. Even if a nunc pro tunc was permissible, no reasons could justify a 19 month postponement trial conflict. See United States v. Doran, 882 F.2d 1511 (10th Cir. 1989).

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served this 15th day of March, 2007 by United States First Class Mail, postage prepaid, upon the following:

Vineet Gauri, AUSA
United States Attorney's Office
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106

JEFFREY M. MILLER

APPENDIX E – ORDER, FILED MARCH 19, 2007

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:
v.	CRIM. NO. 05-167-3
	:
MARTIN KUPER	:

ORDER

On March 23, 2005, the grand jury indicted Defendant Martin Kuper on five counts of Mail Fraud under 18 U.S.C. §1341. On March 29, 2005, Defendant was arraigned before Magistrate Judge Jacob P. Hart and released on bail. On April 7, 2005, a jury trial date of May 17, 2005 was set. On April 13, 2005, Mr. Kuper's co-defendant, Steven Rockman, filed a motion to continue the trial. In that motion, Mr. Rockman's counsel stated that he needed more time to prepare for the trial. Mr. Kuper joined in the motion. On April 18, 2005, I found that granting a

continuance would serve the ends of justice and outweighed the best interest of both the public and the defendant in a speedy trial. Accordingly, I granted the motion. On February 9, 2007, a jury trial date of March 26, 2007 was set.

On March 6, 2007, Defendant filed the instant Motion to Dismiss the Indictment pursuant to the provisions of the Speedy Trial Act. See 18 U.S.C. (SYMBOL) 3161.

Under the Speedy Trial Act,

> The trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date of the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c)(1). Certain periods of delay are excluded in computing the time within which the trial must commence, including

> [a]ny period of delay resulted from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such con-

> tinuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161 (h)(8)(A).

Continuances that do not set a trial date do not violate the Speedy Trial Act "provided they are not permitted to continue for an unreasonably long period of time." United States v. Lattany, 982 F.2d 866 (3d Cir. 1992). In Lattany, the Third Circuit held that a continuance that delayed trial for one year was not unreasonable where the defendant changed attorneys several times and where the defendant's competency was at issue. Id. At 882. Similarly, in United States v. Groff, the Third Circuit held that a continuance of nineteen months was not unreasonable where the case involved unusual discovery-related issues and where the district court was attempting to accommodate the defendant. No. 05-1634, 2006 WL 952226, at *3 (3d Cir. April 13, 2006).

I find that the open-ended continuance in this case is unreasonably long. The continuance was granted because defense counsel needed more time to prepare for trial, but it has delayed the trial for nearly two years. Unlike the defendant in Lattany, this defendant has not changed attorneys, nor are there difficult legal issues involving defendant's sanity or competence. 982 WL 952226, at *3.

The appropriate sanction for a Speedy Trial Act violation is dismissal of the indictment, 18 U.S.C.§ 3162(a)(2). When determining whether to dismiss the indictment with or without prejudice, I consider the following factors: (1) the seriousness of the offense; (2) the facts and circumstances of the case which led to the dismissal; and (3) the impact of a reprosecution on the administration of the Speedy Trial Act and on the administration of justice. Id.; see United States v. Taylor, 487 U.S. 326, 333 (1988).

Considering these factors, I conclude that a dismissal without prejudice is warranted. Defendant was charged with five counts of mail fraud, each of which carries a maximum prison sentence of twenty years. See 18 U.S.C. § 1342; United States v. Carvajal-Garcia, 54 Fed. App'x 732, 735 (3d Cir. Nov. 27, 2002) (twenty-year maximum sentence is "persuasive evidence" that Congress considers the crime to be serious). The indictment charges that Defendant's mail fraud scheme caused a loss exceeding $740,000. Clearly, these offenses are very serious. In addition, the facts and circumstances of this case do not warrant dismissal with prejudice. The Government states that it has been engaged in plea discussions since the insurance of the continuance order, and Defendant does not allege any prosecutorial bad faith. There is no evidence that reprosecution of the defendant would negatively affect the administration of the Speedy Trial Act or the administration of jus-

tice. A dismissal without prejudice would still have a deterrent effect by imposing addition costs on the Government. Defendant has not alleged that the delay has harmed him. Defendant has been at liberty during the pendency of the continuance. Accordingly, I will dismiss the indictment without prejudice.

AND NOW, this 19th day of March, 2007, it is ORDERED that:

(1) Defendant's Motion to Dismiss the Indictment (Doc. No. 62) is **GRANTED**; and

(2) The Indictment is **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

/s Paul S. Diamond, J.

Paul S. Diamond, J.

APPENDIX F– NOTICE OF APPEAL, FILED MARCH 27, 2007

UNITED STATES OF AMERICA

v. Criminal No. 05-CR-167-03

MARTIN KUPER

NOTICE OF APPEAL

Notice is hereby given that the defendant, MARTIN KUPER, appeals the dismissal of the Indictment on March 19, 2007, without prejudice, to the United States Court of Appeals for the Third Circuit

JEFFREY M. MILLER, ESQ.
Attorney for Defendant
Martin Kuper

Dated: March 27, 2007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the attached Notice of Appeal has been served, this 27th day of March 2007, to the following counsel by first class United States mail:

Vineet Gauri, AUSA
United States Attorney's Office
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106

_____

JEFFREY M. MILLER, ESQUIRE
Nasuti and Miller
The Public Ledger Building
Suite 1064
150 S. Independence Mall West
Philadelphia, PA 19106
(215) 829-1101

APPENDIX G – OPINION OF THE COURT

WestLaw.

--F.3d---

--F.3d---, 2008 WL 919677 (C.A.3 (Pa.))

(Cite as: ---F.3d---, 2008 WL 919677)
U.S. v. Kuper
C.A.3 (Pa.) 2008.
Only the Westlaw citation is currently available.
United States Court of Appeals, Third Circuit.

UNITED STATES of America

v.

Martin KUPER, Appellant.

No. 07-1916

Submitted by the Clerk for Possible Dismissal Due to a Jurisdictional Defect Feb. 29, 2008.
Filed April 7, 2008

Background: Defendant was charged with mail fraud. The United States District Court for the Eastern District of Pennsylvania, Paul S. Diamond, J., dismissed the indictment without prejudice. Defendant appealed.

Holding: The Court of Appeals, Sloviter, Circuit Judge, held that dismissal of indictment was not appealable.

Appeal Dismissed.

[1] Criminal Law 110 1023(2)

110 Criminal Law
110XXIV Review
110XXIV(C) Decisions Reviewable
110k1021 Decisions Reviewable
110k1023 Appealable Judgments and Orders

110k1023(2) k. Finality of Determination in General. Most Cited Cases
The rule that the appellate court's jurisdiction is limited to final orders of the district courts, with only a few exceptions, is equally applicable in criminal cases. 28 U.S.C.A. § 1291.

[2] Criminal Law 110 1023(3)

110 Criminal Law
110XXIV Review
110XXIV(C) Decision Reviewable
110k1023 Appealable Judgments and Orders

110k1023(3) k. Preliminary or interlocutory Orders Interlocutory Orders in General. Most Cited

Cases District court's order dismissing mail fraud indictment, without prejudice, based on violation of the Speedy Trial Act was not appealable as final decision. 18 U.S.C.A. § 3162(a)(1); 28 U.S.C.A. § 1291.
[3] Criminal Law 110 1023.5

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1023.5 k. Right to Review in General.

Most Cited Cases.
Bearing the discomfiture and cost of a prosecution for a crime even by an innocent person is one of the painful obligations of citizenship.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, (D.C. No. 05-cr-00167-3), District Judge: Honorable Paul S. Diamond.
Burton A. Rose, Philadelphia, PA, for Appellant.
Vineet Gauri, Office of United State Attorney, Philadelphia, PA, for Appellee.
Before SLOVITER, FISHER, and HARDIMAN, Circuit Judges.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

*1 The issue before us is whether an order of the District Court granting, without prejudice, defendant's motion to dismiss the indictment based on a violation of the Speedy Trial Act is appealable at this time. This court has not previously addressed that issue, although many of our sister circuits have.
---F.3d---
---F.3d---, 2008 WL 919677 (C.A.3 (Pa.))
(Cite as: ---F.3d---, 2008 WL 919677)

I.

On March 23, 2005, Martin Kuper and two codefendants, Steven Rockman and Jeffrey Foster, were indicted on five counts of mail fraud in violation of 18 U.S.C.§§ 1341 and 1342. The trial dated was initially set for May 17, 2005. Defendant Rockman moved for a continuance, which the District Court granted on April 18, 2005, under the Speedy Trial Act's "ends of justice" provision. 18 U.S.C. § 3161(h)(8)(A). Foster entered a guilty plea on June 12, 2006 and Rockman entered a guilty plea on February 6, 2007. Both defendants who pled guilty became cooperating witnesses for the government. This left Martin Kuper as the sole defendant. By or-

der February 9, 2007, the District Court set the dated for Kuper's Trial as March 26, 2007. On March 6, 2007, Kuper filed a motion to dismiss the indictment based on a violation of the Speedy Trial Act. The District entered an order on March 19, 2007, granting Kuper's motion and dismissed the case without prejudice. Kuper filed a timely notice of appeal, arguing that the indictment should have been dismissed with prejudice. *See* 18 U.S.C. § 3162(a)(1). The Government responded, arguing that this court lacks jurisdiction over Kuper's appeal because it is take from an order that is not appealable at this time. We turn to that issue.

II.

[1] The rule that this court's jurisdiction is limited to final orders of the district courts, *see* 28 U.S.C. § 1291, with only a few exceptions, is equally applicable in criminal cases. *United States v. MacDonald,* 435 U.S. 850, 853, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978). In *MacDonald,* the Court held that a district court's order denying a defendant's motion to dismiss an indictment because of an alleged violation of defendant's Sixth Amendment right to a speedy trial was not appealable because "such an order obviously is not final in the sense of terminating the criminal proceedings in the trial court." *Id.* at 857.

To be sure, the Supreme Court has held that certain orders in criminal cases fall within the collat-

eral order doctrine enunciated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and are therefore appropriate for interlocutory appeal. *See Stack v. Boyle*, 342 U.s. 1, 6-7, 72 S.Ct. 1, 96 L.Ed. 3 (1951) (holding appealable an order denying motion to reduce bail); *Abney v. United States*, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) (holding appealable an order denying pretrial motion to dismiss indictment on double jeopardy grounds). In *MacDonald*, the Court explained that if review of an order denying bail had to await final judgment, the right would probably be lost irreparably, 435 U.S. at 855 (citing *Stack*, 342 U.S. at 12 (Jackson, J.)). Similarly, the right conferred by the Double Jeopardy Clause would be "'significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.' " *Id.* at 856 (quoting *Abney*, 431 U.S. at 660).

*2 [2] In contrast, an order denying a motion to dismiss an indictment on speedy trial grounds does not represent a final rejection of a defendant's claim. *Id.* at 858. It is not independent of the outcome of the trial, and the defendant's speedy trial right would be satisfied by an acquittal. *Id.* at 859. The same considerations apply to the District Court's determination that the dismissal of defendant Kuper's indictment should be without prejudice. Every court of appeals should be without prejudice. Every court

of appeals that has considered the appealability of an order dismissing an indictment without prejudice has held such an order is not final and appealable under § 1291. *See, e.g., United States v. Ford,* 961 F.2d 150, 151, (9th Cir. 1992) (per curiam) (dismissal without prejudice is not a final decision within the meaning of 28 U.S.C. § 1291); *United States v. Tsosie,* 966 F.2d 1357, 1361 (10th Cir. 1992) (dismissal without prejudice is not a final decision under either 28 U.S. C. § 1291 or the collateral order doctrine); *United States v. Holub,* 944 F.2d 441, 442 (8th Cir. 1991) (same); *United States v. Jones,* 887 F.2d 492, 493 N.2 (4th Cir. 1989) (court would have lacked jurisdiction to hear any appeal of dismissal order granted without prejudice under the Speedy Trial Act); *United States v. Kelley,* 849 f.2d 1395, 1397 (11th Cir. 1988) (per curiam) (any challenge to the dismissal of an indictment without prejudice must await the defendant's subsequent conviction); *United States v. Reale,* 834 F2d 281, 282 (2d Cir. 1987) (per curiam) (same) *United States v. Bratcher,* 833 F.2d 69, 72 (6th Cir. 1987) (an order dismissing an indictment is not final and appealable).

Kuper does not attempt to distinguish *MacDonald* or the decisions of the other courts of appeals holding nonappealable defendants' claims that the dismissal should have been with prejudice. Instead, he relies on the Supreme Court's recent decision in *Zedner v. United States,* 547 U.S. 489, 126 S.Ct. 1976, 164

L.3d.2d 749 (2006). In *Zedner,* the defendant had signed a form prepared by the district court waiving his rights to a speedy trial under the Speedy Trial Act. *Id.* at 494. More than four years later, after "a variety of proceedings," that included, inter alia, inquiry into the defendant's competency, the defendant moved to dismiss the indictment for failure to comply with the Speedy Trial Act. *Id.* at 495-96. The district court denied the motion on the ground that defendant had waived his Speedy Trial Act rights "for all time." *Id.* at 496. Defendant was thereafter hospitalized, but several months later he was found to be competent to stand trial, albeit delusional. *Id.* The trial proceeded more than seven years after he was indicted and the jury found him guilty on six counts of attempting to defraud a financial institution. *Id.* He was sentenced to 63 months of imprisonment and the Court of Appeals affirmed the conviction. *Id.* at 496-97.

The Supreme Court granted certiorari to consider the standard for analyzing whether a defendant has made an effective waiver of rights under the Act.*Id.* at 497. The Court held, inter alia, that a defendant may not prospectively waive the application of the Speedy Trial Act. *Id.* at 500. In reaching that determination, Justice Alito, writing for the Court, rejected the government's estoppel argument, *id.* at 503-04, and instead noted the public's interest in "reducing defendants' opportunity to commit crimes

while on pretrial release and preventing extended pretrial delay from imparing the deterrent effect of punishment." *Id.* at 501.

*3 The considerations discussed in Zedner are not directed to the issue before us, the availability of appellate review. Indeed, they are not directed to the issue of dismissal with or without prejudice. It is of some interest that the Court remanded, "leav[ing] it to the district Court to determine in the first instance whether dismissal should be with or without prejudice." *Id.* at 509. Nothing in *Zedner* affects the long-standing interpretation of the federal courts that the purpose of the Speedy Trial Act does not encompass a "right not to be tired." *See, e.g., United Stated v. Mehrmanesh,* 652 F.2d 766, 769 (9th Cir. 1981); *United States v. Wilkes,* 368 F.Supp.2d 366, 368 (M.D.Pa.2005) (holding that order denying motion to dismiss an indictment underappealable). Ultimately, Kuper will be able to appeal the dismissal of his first indictment if he is reindicted and convicted. *See, e.g., United States v. Wright,* 6 F.3d 811, 813 (D.C.Cir.1993).

[3] Because Kuper does not have a right to be free from re-indictment or a second trial, his additional argument predicated on personal hardship is not persuasive. "'[B]earing the discomfiture and cost of a prosecution for a crime even by an innocent person is one of the painful obligations of citizenship."

"*United States v. Levine,* 658 F.2d 113, 128 (3d Cir. 1981) (quoting *Parr v. United States,* 351 U.S. 513, 519-20, 76 S.Ct. 912, 100 L.Ed. 1377 (1956)). Inasmuch as Kuper has no right to be free from reindictment, he has not right that would be irreparably lost if he were denied the opportunity to appeal. The Supreme Court has stated that "it makes no difference whether the dismissal [of an indictment] leaves [a defendant] open to further prosecution... The testing of the effect of the dismissal order must abide petitioner's trial, and only then, if convicted, with he have been aggrieved." *Parr,* 351 U.s. 513, 519-20, 76 S.Ct. 912, 100 L.Ed. 1377 (1956)). Inasmuch as Kuper has no right to be free from reindictment, he has no right that would be irreparably lost if he were denied the opportunity to appeal. The Supreme Court has stated that "it makes no difference whether the dismissal [of an indictment] leaves [a defendant] open to further prosecution....The testing of the effect of the dismissal order must abide petitioner's trial, and only then, if convicted, will he have aggrieved." *Parr,* 351 U.S. at 517.

III.

For the reasons set forth, we will dismiss Kuper's appeal for lack of jurisdiction.

C.A.3 (Pa.), 2008.
U.S. v. Kuper

---F.3d---, 2008 WL 919677 (C.A.3 (Pa.))

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APPENDIX H – JUDGMENT, DATED APRIL 7, 2008

UNITED STATES OF AMERICA

v.

MARTIN KUPER,

Appellant.

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. No. 05-cr-00167-3)
District Judge: Honorable Paul S. Diamond

Before: SLOVITER, FISHER, and HARDMAN Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted by the

Clerk on February 29, 2008 for possible dismissal due to a jurisdiction defect.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the appeal of an order of the District Court entered on March 19, 2007, be and the same is hereby DISMISSED. All of the above in accordance with the opinion of this Court.

Attest:

DATED: April 7, 2008 Marcia M. Waldron
Clerk

APPENDIX I –ORDER DATED MAY 5, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-1916

UNITED STATES OF AMERICA

v.

MARTIN KUPER,

Appellant.

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHTER. CHAGARES, JORDAN, and HARDIMAN Circuit Judges

The petition for rehearing filed by Appellant Martin Kuper in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit

judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: May 5, 2008
PDB/cc: Vineet Gauri, Esq.
Burton A. Rose, Esq.